

Why Throw a Constitution out of the Window Instead of Making it Work?

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Professors András Sajó and Andrew Arato have [pointed out](#) a crucial problem: how can constitutionalism be restored if the unified opposition wins the Hungarian general election in Spring 2022? The topic is of crucial relevance regarding that even if the opposition wins, it probably cannot achieve a two-thirds majority in parliament which is required to amend the current constitution or adopt a new one. The seven questions raised by the two professors are based on the presumption that, on the one hand, the current Hungarian Basic Law lacks proper democratic legitimacy and that it is inconsistent on the other. From this starting point, they concentrate on the options of how a new constitution could be adopted without a two-thirds-majority in parliament. I argue that the above presumptions are not entirely correct. First, “extra-constitutional constitution making” will not lead us out of the rule of law crisis but is a danger to the rule of law itself. Second, the main shortcoming of constitutionalism in Hungary is not caused by the text of the constitution but [by the electorate](#). In addition to both of these points, I will also briefly sketch what the European Union should (not) do.

How flexible is the concept of democratic legitimacy?

“Is a democratic community bound to follow constitutional rules of dubious democratic nature?” – ask Sajó and Arato referring to the adoption of the current Basic Law in 2011, exclusively with the votes of Fidesz-MPs and without any substantial debate or compromise with the opposition. Yet, even though there has been a lack of dialogue and transparency, the enactment was formally in line with the rules of constitution-making which required a two-thirds majority in parliament; describing this process as of “dubious democratic nature” is a huge exaggeration.

The way the new constitution was prepared might not be elegant, but it certainly was not illegitimate. Following the logic of Sajó and Arato, the German constitution would also be of “dubious democratic nature” as the Grundgesetz came into existence under the control of the occupying allied powers and was intended to be provisional. Or, staying with the example of Hungary, the former constitution, which was completely rewritten at the time of the democratic transition, would be similarly dubious from this point of view because the participants of the Round Table Talks and the communist parliament lacked democratic legitimacy. The current Hungarian Basic Law, by contrast, was adopted by a parliament that was legitimised by a two-thirds majority of the (active) electorate.

But there is also another question of the two professors worth considering. Related to the idea of a constitutional referendum, they ask “what kind of popular

participation would legitimize extra-constitutional constitution-making". The answer is simple: a two-thirds majority – not at a referendum (since a referendum cannot be held on constitutional topics pursuant to the Basic Law), but at the general election so that constitution-making will not be extra-constitutional at all.

Overriding the rules of the former constitution upon the creation of a new one might be acceptable after revolutions or at transitions from dictatorship to democracy. In Hungary, this is not the case. The Orbán-regime is not a dictatorship – not least a victory of the opposition in the upcoming election would prove this.

Exceptional methods should be applied only in exceptional times. Once we accept "extra-constitutional" constitution-making after normal elections and a regular change of government, nothing would guarantee that the rules of constitution making will not be simply overridden right after the next election. If, in effect, something further weakens the rule of law, it is constitution-making every four years.

Why doesn't the Hungarian constitution function?

I do agree with Professors Arato and Sajó, however, that some parts of the Hungarian Basic law are incompatible with each-other. But I think the much more serious problem lies with the constitution. Apart from the inconsistency of the Basic Law, which is mainly the result of later amendments, often motivated by the daily political interest of the governing party, the Basic Law essentially reflects basic principles of liberal democracy, both regarding institutions and fundamental rights.

The real problem is that the constitution does not function. And this has less to do with its text but with constitutional practice. It is a problem of those who are supposed to operate the constitutional system: public administration officials who simply ignore applicants, prosecutors who are reluctant to investigate certain cases of corruption, and constitutional judges who regularly avoid substantial decision-making in politically delicate cases. And, of course, there is the political elite that continues to suggest that laws and constitutional principles do not necessarily apply to all in the same way. This problem has been known in Hungary since the democratic transition, but it has become much more serious and visible in the last eleven years when the government has often used [personalised legislation](#) to favour friends and punish enemies.

This general problem can be solved neither by textual changes to the constitution (or by an entirely new one), nor by dismissing the entire Constitutional Court or parts of the public administration. (The opposition has already mentioned the dismissal of constitutional judges and other leading officials as a realistic option.) The demand for constitutionalism and legal certainty must stem from society. A society that lacks that claim, cannot be changed from one day to another.

In a country where a government that systematically undermines the rule of law and restricts institutional independence is re-elected twice, the main shortcoming of constitutionalism is not caused by the text of the constitution but [by the electorate](#).

This is certainly good news for the opposition, in so far as voters will probably not punish them for pondering over “extra constitutional” constitution-making. They simply will not care. The danger, however, is that society might further split into two camps and that one part of the country will obey the new rules, while another the old ones. The outcome could easily be chaos: precisely the opposite of the rule of law.

If the current opposition really wants to strengthen constitutionality in the long term, it should first set an example for the people. For instance, they could show real respect for constitutionalism by keeping the constitution, which was not respected even by its creators, as the Fidesz-government often did not comply with the constitution or amended it along immediate political interests. Of course, the Basic Law should be corrected at some points. For example, it should be guaranteed that the Constitutional Court does its job instead of avoiding or delaying substantial decision making and the rules of referenda should be less restrictive, particularly regarding the high validity threshold and the long list of prohibited subjects. As such reforms aim at counterbalancing the power of the parliamentary majority, they are in the interest of the opposition (of Fidesz, if they are defeated) as well, so it will not be impossible to reach the required two-thirds majority for them.

What should the EU (not) do?

Unlike the Hungarian people, the EU deals a lot with the rule of law in Hungary, even if the several resolutions, reports and the stalled Article 7 TEU procedure have mostly been useless. Now, the Commission is about to launch the new [rule of law conditionality mechanism](#) against Hungary, which may result in the suspension of payments of EU funds.

And this is another trap for the opposition. Whether they will govern or not, opposition-led local governments will [also suffer](#) from the lack of EU-funding which is crucial for the development of villages and towns.

At the same time, a future government will face difficult decisions if the restart of payments is bound to institutional changes that require a two-thirds majority in parliament. Such a scenario must not be an excuse for overriding national procedural rules of legislation while alluding to the restoration of the rule of law.

The Commission and other EU institutions should be aware of their responsibility: they cannot encourage the government of any member state to disrespect the constitution, and neither should they sit back silently if that happens. If the constitution-making and amending by Fidesz with their legally obtained two-thirds majority counted as illegitimate, constitutional revision with a simple majority cannot be acceptable. If the sudden redesign of institutions gave reason for serious concern eleven years ago, it cannot be welcomed now. If nepotistic practices were scandalous, a witch hunt cannot be in order.

During the last eleven years, the government has illustrated many times how repulsive it is when politics forms law in its own image. The promised “new transition” should not begin by repeating this failure.

